

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :

of :

**B & D CORP. OF LAKE GEORGE :**

DETERMINATION

DTA NO. 816349

for Revision of a Determination or for Refund of Sales and :  
Use Taxes under Articles 28 and 29 of the Tax Law for the  
Periods September 1, 1994 through November 30, 1994, :  
June 1, 1995 through August 31, 1995 and December 1,  
1995 through November 30, 1996. :

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Petitioner, B & D Corp. of Lake George, 75 Dieskau Street, Lake George, New York  
12845-1539, filed a petition for revision of a determination or for refund of sales and use taxes  
under Articles 28 and 29 of the Tax Law for the periods September 1, 1994 through November  
30, 1994, June 1, 1995 through August 31, 1995 and December 1, 1995 through November 30,  
1996.

On June 30, 1999 and July 2, 1999, respectively, petitioner, by Lawrence T. Dahlke, Esq.,  
and the Division of Taxation, by Terrence M. Boyle, Esq. (Gary Palmer, Esq., of counsel),  
waived a hearing and agreed to submit this matter for determination based on documents and  
briefs submitted by October 27, 1999, which date began the six-month period for the issuance of  
this determination. After review of the evidence and arguments presented, Timothy J. Alston,  
Administrative Law Judge, renders the following determination.

***ISSUE***

Whether a Notice of Determination issued to petitioner, a purchaser in a bulk sale transaction, for the unpaid sales and use tax liabilities of the seller should be sustained.

***FINDINGS OF FACT***

1. Pursuant to an Asset Purchase Agreement dated December 26, 1996, petitioner, B & D Corp. of Lake George,<sup>1</sup> purchased certain assets from Brian A. Davidson. The assets listed in the purchase agreement were furniture and fixtures used by the seller in the operation of a restaurant and bar. As set forth in the agreement, the purchase price for the assets was \$18,500.00. The Asset Purchase Agreement lists 75 Dieskau Street, Lake George, New York as the address for both the seller and the purchaser (petitioner).

2. A letter dated January 3, 1997 from petitioner's representative to the Division of Taxation ("Division") indicates that petitioner paid sales tax of \$1,295.00 on the "bulk sale" of the assets sold pursuant to the Asset Purchase Agreement. This letter refers to the seller, Brian A. Davidson, along with a tax identification number for the seller of 14-1679272.

3. On March 10, 1997, petitioner filed a Notification of Sale, Transfer or Assignment in Bulk (Form AU-196.10) dated March 5, 1997 with the Division. This notification reported the sale of assets pursuant to the Asset Purchase Agreement dated December 26, 1996 and listed January 3, 1997 as the scheduled date of the sale. The notification identified the seller as Brian A. Davidson and the name of the business as Windjammer Pub & Restaurant located at 75 Dieskau Street, Lake George, New York.

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<sup>1</sup> Petitioner's name is listed as B & D Corp. of Lake George Jill & Harvey's Back Street Pub on the Notice of Determination and the petition. Petitioner's name on other documents in the record is B & D Corp. of Lake George.

4. On April 4, 1997, the Division issued a Notice of Claim to Purchaser to petitioner. This document identified petitioner as purchaser and Bruce Davidson d/b/a Windjammer Pub & Restaurant as seller and advised petitioner, in part:

We have received information indicating that you are the purchaser in a bulk sale of the seller's business assets which has been made or is about to take place. The New York State Department of Taxation and Finance hereby serves notice of a possible claim for any New York State and local sales and use taxes due in accordance with the provisions of Articles 28 and 29 of the Tax Law.

You are hereby notified that, in spite of any provisions contained in the sales contract, except as indicated in condition number two listed below, no distribution of funds or property, to the extent of the amount of the State's claim, may be made before the following conditions have been met:

1. The Department of Taxation and Finance has determined the seller's liability, if any.
2. Payment of such liability has been made to the Department (payment may be made from the funds being withheld in accordance with Section 1141(c) of the Tax Law).
3. This office has authorized you to release the funds or property.

5. On June 9, 1997, the Division issued to petitioner, B & D Corp. of Lake George Jill & Harvey's Back Street Pub, a Notice of Determination which assessed tax due for the following periods and in the following amounts:

<i><b>Tax Period</b></i>	<i><b>Tax Amount Assessed</b></i>
9/1/94-11/30/94	\$ 542.78
6/1/95-8/31/95	2,898.05
12/1/95-2/29/96	1,153.53
3/1/96-5/31/96	1,316.77
6/1/96-8/31/96	757.80
9/1/96-11/30/96	3,622.56

<i><b>Total Tax Assessed</b></i>	\$10,291.49
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6. The tax assessed in each of the sales tax periods listed in the Notice of Determination was equal to the sales tax due as reported on the sales tax returns filed by Jade Palace Restaurant, Inc. for the same periods. Payment for such taxes was not remitted with the returns.

7. The Division submitted the sales tax returns of Jade Palace Restaurant, Inc. for five of the six sales tax quarters at issue. Four of these returns bear the signature of Brian A. Davidson as president. The returns list 75 Dieskau Street, Lake George, New York as this corporation's address and describe the business as a restaurant and tavern. The returns list a tax identification number for the taxpayer of 14-1679272. This is the same number listed for the seller in the letter to the Division dated January 3, 1997 (*see*, Finding of Fact "2").

8. The Division was unable to locate the sales tax return of Jade Palace Restaurant, Inc. for the period September 1, 1996 through November 30, 1996. The Division therefore consents to the cancellation of the tax assessed against petitioner for that quarter.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1141(c) sets forth the rights, obligations and liabilities of both purchasers and sellers in a bulk sale transaction. This section provides that a person who purchases in bulk the whole or any part of the business assets of a person required to collect tax must file with the Division a notice of bulk sale at least 10 days before taking possession of, or paying for, such assets, whichever comes first. The failure to timely file a notice of bulk sale by a purchaser results in the purchaser's personal liability for the taxes due from the seller, limited to the purchase price or fair market value of the business assets sold, whichever is higher. Within 90

days of the notice of bulk sale the Division will give notice of the actual amount of taxes due from the seller to both the purchaser and the seller.

B. In this case, petitioner, as a bulk sale purchaser, failed to timely file the Notification of Sale, Transfer or Assignment in Bulk as required under Tax Law § 1141(c). Petitioner filed such notice approximately three months after the sale and not at least 10 days before the sale as required by the statute. Petitioner therefore became personally liable for taxes due from the seller. Accordingly, the Division's assessment of such taxes against petitioner was proper.

C. In its petition, petitioner complained that the seller in the bulk sale transaction had "fraudulently misrepresented to petitioner his ownership status in Jade Palace Restaurant, Inc., the title to the assets purchased, and the nature and extent of any liabilities owed." This assertion, even if true, does not relieve petitioner of liability under Tax Law § 1141(c), for that provision contains no exceptions to purchaser liability in the event of fraud by the seller. Indeed, petitioner's failure underscores the importance of compliance with section 1141(c) and highlights the protections that 1141(c) provides to purchasers. If petitioner had complied with 1141(c), it would have been alerted to the existence of outstanding liabilities against the seller prior to the transfer of any funds and could have avoided such liabilities.

D. The petition of B & D Corp. of Lake George is denied and the Notice of Determination dated June 9, 1997, as modified in accordance with Finding of Fact "8", is sustained.

DATED: Troy, New York  
January 20, 2000

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE